No. 78-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER

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REPLY OF PETITIONER

Certiorari has been sought to review the opinion and order below by American Telephone and Telegraph Company in this case, by the Federal Communications Commission in No. 78-270, and by the United States Independent Telephone Association in No. 78-216. This reply is filed by AT&T in response to oppositions to certiorari filed by MCI and by Southern Pacific Communications Company ("SPCC").

I. The Lower Court's Unlawful Exercise of An Administrative Power Violates Settled Restrictions on Judicial Review Imposed by This Court.

Contrary to settled decisions of this Court which circumscribe judicial power,[1] the lower court has *affirmatively ordered* the FCC to exercise in a particular way a discretionary power conferred by Congress exclusively upon the FCC. Neither the rhetoric of MCI nor the assurances of SPCC can obscure the extraordinary step taken by the District of Columbia Circuit in this case.

Section 201(a) of the Communications Act gives the FCC alone the power to order interconnection between carriers and requires that such orders be based on public interest findings. The FCC unequivocally states that it has never ordered interconnection for switched public message service like Execunet.[2] Further, the lower court itself conceded that the FCC has never affirmatively found that the offering of switched public message service by specialized carriers would serve the public interest.[3] It follows *a fortiori* that no public

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[1] *E.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 98 S. Ct. 1197 (1978).

[2] The FCC's determination that its prior interconnection orders in *Full System Tariff Offerings* were limited to specialized private line service is directly supported by the facts and rationale of those orders; by the Third Circuit's reasoning and holding; and by the deference due to an agency construing its own orders. See AT&T Pet. 5-6, 13.

[3] In *Execunet*, the lower court itself held that the FCC had never affirmatively decided whether or not competition for switched public message service would serve the public interest. See 561 F.2d at 378, 380 (AT&T Pet. App. 25i, 29i-30i). Such an affirmative

interest finding can have been made sufficient to support an interconnection order for that service pursuant to Section 201(a). Yet the lower court, lacking the necessary FCC interconnection order or public interest findings, nevertheless ordered the FCC to require interconnection for a switched public message service.

This Court has consistently and emphatically held that a reviewing court may not "exercise an essentially administrative function."[4] Were the FCC to order Execunet interconnection without the necessary public interest findings, this would clearly violate Section 201(a). For the lower court to require such interconnection is an even more serious breach of Congress' will: it means that the lower court has superseded the authority expressly conferred by Congress on the agency and has "judicially" embarked upon a determination of communications policy.

The respondents' attempts to rationalize the lower court's action only underscore its impropriety. MCI and SPCC assert that the lower court's extraordinary interconnection order was nothing but enforcement of its *Execunet* mandate. MCI Br. 15-18; SPCC Br. 13-14. The infirmity of this argument goes far beyond its misapplication of well-settled rules concerning the interpretation and enforcement of judicial mandates.[5]

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finding is plainly a prerequisite for issuing an interconnection order to require Bell System interconnection for specialized carriers to provide such a service.

[4] *FPC* v. *Idaho Power Co.*, *supra*, 344 U.S. at 21, and numerous cases cited at AT&T Pet. 15 n.22.

[5] It is sufficient to contrast the rule that failure to make "explicit mention" of an issue leaves the matter open for consideration on remand (*Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970)), with the lower court's admission that interconnection was not

Whatever the lower court may now say the *Execunet* mandate intended on a subject never addressed in the decision, the controlling principle is that the court cannot lawfully dictate how the agency shall exercise its regulatory power. This was the very holding of this Court in the *Pottsville* case in the face of a nearly identical claim by the lower court that it was merely compelling obedience to its prior mandate. 309 U.S. at 141, 145.

The *ultra vires* character of the lower court's interconnection order is also emphasized by respondents' claims that the FCC's declaratory ruling departed from the reasoning of *Execunet* in determining the scope of previous FCC interconnection orders. MCI Br. 16-17; SPCC Br. 13-14. A reviewing court [6] which found an inconsistency in reasoning [7] would properly exercise its ordinary judicial review function by remanding for further consideration free of the legal error. What it could not do is to determine the ultimate result by directing, as the lower court did here, that

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"addressed explicitly" in *Execunet*. Slip op. 11 (Pet. App. 10a-11a). Even respondents' own descriptions of *Execunet* do not so much as intimate that the interconnection issue was involved. MCI Br. 10; SPCC Br. 8. None of the lower court cases respondents cite on mandate construction (MCI Br. 18; SPCC Br. 14 n. 51) suggest that the reviewing court may, as here, extend its mandate to questions neither addressed nor decided on appeal.

[6] The lower court, which had before it only a motion to enforce a mandate, was not in this case properly sitting to review the merits of the declaratory order or pass upon the soundness of its reasoning.

[7] In fact, no such inconsistency exists; it is the lower court that has departed from its own earlier reasoning and assurances. See AT&T Pet. 14, n.21; MO&O, para. 61 (Pet. App. 36c-37c).

interconnection should be ordered at once and regardless of the agency's reconsideration.

The lower court has assumed here the power which the Communications Act vests in the agency. Consequently, this case, like *Pottsville, Idaho Power,* and *Vermont Yankee,* requires this Court "to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively" and to compel "due observance by courts of the distribution of authority made by Congress . . . ." 309 U.S. at 136, 141. In an era of extensive federal agency regulation and judicial review, few questions are more important or more deserving of review by this Court.

II. The Lower Court's Disregard of the Third Circuit's Exclusive Jurisdiction Presents a Fundamental Question Under the Hobbs Act.

The Hobbs Act, 28 U.S.C. § 2341 *et seq.,* allocates jurisdiction to review agency proceedings among the co-equal lower appellate courts. That act and related statutes establish important priorities of jurisdiction; their proper application is critically important to the fair administration and functioning of judicial review. These interests warranted the grant of certiorari in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1950),[8] and they justify review by this Court in other similar cases.

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[8] The bearing and importance of *City of Tacoma* is that MCI and SPCC, both parties in *Bell of Pennsylvania,* are bound by the Third Circuit's determination that AT&T's interconnection obligations are limited to private line services. Respondents themselves urged this result on the Third Circuit, and they were joined in that position by the FCC and the United States in a brief signed by the Assistant Attorney General of the Antitrust Division of the Department of Justice. See MO&O paras. 48-49 (Pet. App. 28c-29c).

Clearly this is such a case. The Third Circuit held in *Bell of Pennsylvania* that the FCC did not and, on the existing record could not, order interconnection for specialized carrier services other than private line services. 503 F.2d at 1273-74 (Pet. App. 42g). Under the Hobbs Act, the Third Circuit had obtained "exclusive jurisdiction" and its resolution of the scope of interconnection obligations was "final." 28 U.S.C. §§ 2349, 2350. Nevertheless, the court below has now said that the FCC must order interconnection for a service determined by the expert agency to be the opposite of private line service. See Slip op. 16 (Pet. App. 15a). The FCC correctly observes that it faces the "dilemma of whether to obey one circuit or the other" (FCC Pet. 26), because it is impossible to obey both. The Hobbs Act's grant of exclusive jurisdiction has plainly been ignored.[9]

Respondents seek to avoid the Third Circuit's clear determination that interconnection was limited to private line service by suggesting that that determination was dictum, unimportant, or addressed to concerns not here present. MCI Br. 18-20; SPCC Br. 17-18. However, the very rationale of the interconnection orders in *Bell System Tariff Offerings* was to implement full and fair competition in *private line* services. 46 F.C.C.2d at 427. The Third Circuit affirmed those orders—in the face of vagueness and overbreadth concerns—only be-

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[9] MCI's suggestion that AT&T decided to "accept" the lower court's jurisdiction (MCI Br. 14-15) is contrary to fact. MCI first interjected the interconnection question into this case by its purported motion to enforce the mandate, and AT&T—citing the Hobbs Act grant of exclusive jurisdiction—immediately objected that the Third Circuit was the proper forum to consider the issue. AT&T opp., March 2, 1978, pp. 19, 25.

cause their scope was limited to interconnection elements of "private line service." 503 F.2d at 1273-74 (Pet. App. 42g). Only by distorting history and ignoring the Third Circuit's own language can respondents pretend to reconcile the decisions.

Respondents also contend that even if the Third Circuit did confine the interconnection orders to private line service, "the term 'private line' was used as an abbreviated expression or shorthand for a broader category." MCI Br. 20. See SPCC Br. 18. Whether broad or narrow, no rational construction of the private line concept could extend it to ordinary long distance service, like Execunet, which the FCC has found to be the very antithesis of private line service. 60 F.C.C.2d at 42, 59-62. Moreover, since there is at present no public interest finding that switched public message competition is in the public interest, no extension of the interconnection obligation to such a service could be valid under Section 201(a).[10]

Like the question of court and agency authority, the authority of one federal court *vis-à-vis* another is the type of issue properly resolved by this Court. The issue is sharpened where, as here, the inconsistent decisions of the reviewing courts concern the same agency orders, involve the same parties, and produce an outcome which is a logical impossibility. See AT&T Pet. 20. The mediating exclusivity provision of the Hobbs Act was designed to resolve precisely this type of case, but it will be virtually a dead letter unless enforced by this Court.

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[10] While the FCC could expand the existing interconnection orders after new hearings and public interest findings, it has never purported to issue any new orders after those reviewed in the 1974 *Bell of Pennsylvania* decision.

III. Respondents' Miscellaneous Arguments Against Review by This Court Are Without Merit.

In attempting to defeat certiorari, MCI and SPCC offer several other arguments, none of which has merit. Much of MCI's brief is devoted to rhetorical accusation and innuendo which is largely irrelevant and entirely baseless.[11] Several of the more general contentions do deserve brief comment, not least because they actually emphasize the importance of certiorari in this case.

1. Respondents argue quite wrongly that this case is simply a reiteration of *Execunet*. See, *e.g.*, SPCC Br. 14-15. *Execunet* involved specialized carrier authority, not interconnection, which the lower court itself described as a "very different issue."[12] 561 F.2d at 378 n.59 (Pet. App. 25i). Moreover, *Execunet*, whether or not wrongly decided, presented a conventional issue of statutory construction and resulted in a remand; by contrast, in the present case, the issues arise not from mere legal error but from the lower court's fundamental mis-assumption of authority to dictate the agency's result and from its invasion of the exclusive jurisdiction of a coordinate court.

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[11] MCI is especially egregious in suggesting that AT&T ever conceded in *Execunet* that the Bell System was or would be obligated to provide interconnection for Execunet type service. MCI Br. 15-16. Interconnection was simply not at issue in *Execunet*. See AT&T Pet. 8, 15.

[12] There is no basis for MCI's claim (MCI Br. 22) that AT&T is precluded from questioning AT&T's obligation to provide interconnection because AT&T did not raise the issue in *Execunet*. The *Execunet* proceeding was entirely concerned with MCI's tariff authority. Moreover, the scope of the interconnection obligation had already been litigated in and resolved by the Third Circuit.

2. Alternatively, respondents argue that denial of interconnection would render the *Execunet* decision nugatory. MCI Br. 18; SPCC Br. 15. *Execunet* established that the FCC could not reject MCI's Execunet tariffs based on limitations on specialized carrier authority; and that determination is not altered by concluding that MCI has not yet established that the public interest would be served by the interconnection of its facilities with those of other carriers so that it may provide switched public message service. The "futility" argument made by respondents is not only devoid of logic [13] but was explicitly rejected by this Court in *Pottsville*. 309 U.S. at 145-46.

3. MCI argues that it is necessary to full and fair competition that it be entitled to use Bell System interconnection facilities to divert to MCI's network intercity switched public message traffic that would otherwise be carried on Bell System's intercity facilities. However, this is exactly the type of public interest question that the FCC is entitled to resolve before any such interconnection is ordered. See Section 201 (a). MCI's own argument here, also made in the court below, emphasizes how much MCI's position rests on persuading the courts to displace the Commission in establishing communications policy.

4. Finally, SPCC points to FCC rulemaking proceedings and to proposed legislation to support its erroneous claim that certiorari would be premature.

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[13] Litigation is often won without carrying the appellant the full distance to his ultimate goal. *Mutual Life Insurance Company* v. *Hill*, 193 U.S. 551, 553 (1904). The lower court itself recognized that "litigation in the courts does not always provide the victor with all that he might wish, or with all that he expected or thought he had won." Slip op. 10 (Pet. App. 9a).

SPCC Br. 19-21. The very pendency of these policy-making proceedings, however, confirms the lower court's error in preempting them. The legislative processes of Congress and the quasi-legislative processes of the FCC have just now been engaged to consider the complex and important public policy questions concerning the nature and scope of competition, if any, in long distance telephone service.[14] In directing the FCC to order interconnections for MCI's Execunet service, the lower court has not only taken one side in this undeniably important debate, but it has made national policy and dictated that its own views be implemented immediately.

* * *

By affirmatively ordering the FCC to require interconnection, the lower court in this case has crossed the line between reviewing agency decisions and dictating agency policy. From *Pottsville* in 1940 to the editorial advertising and cross-ownership cases in recent years,[15] this Court has been alert to correct the lower court wherever it has trespassed across that line. Certiorari is no less essential here to assure that communications policy is made by the Commission, as intended by Congress, and not by the District of Columbia Circuit.

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[14] As MCI states, the FCC is "now in the initial stages" of its inquiry (MCI Br. 26)—the agency has not yet even decided how to structure the proceeding. Similarly, the first round of subcommittee hearings on H.R. 13015, the recently proposed communications legislation, had not even finished before the bill's sponsor promised to redraft it. *Broadcasting*, Sept. 18, 1978, p. 23.

[15] *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973), *reversing Business Executives' Move For Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971); *FCC* v. *National Citizens Committee for Broadcasting*, 98 S. Ct. 2096 (1978), *reversing National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977).

CONCLUSION

For the foregoing reasons and for the reasons stated in AT&T's petition, certiorari should be granted.

Respectfully submitted,

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